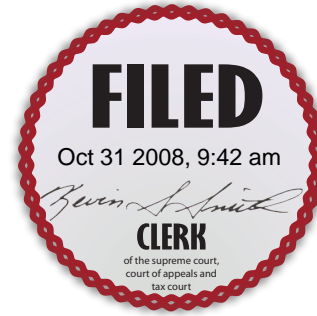


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WENDY LYN CARR,
Appellant-Respondent,

vs.

JEFFREY SCOTT REAGAN,
Appellee-Petitioner.

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No. 40A01-0806-CV-257

APPEAL FROM THE JENNINGS SUPERIOR COURT
The Honorable James Funke, Jr., Judge
Cause No. 40D01-0106-DR-122

October 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Wendy Lyn Carr (“Mother”) appeals the trial court’s grant of a motion filed by Jeffrey Scott Reagan (“Father”) to modify custody of the parties’ minor child, J.R. Mother raises two issues, which we consolidate and restate as whether the trial court abused its discretion by granting Father’s motion based on Mother’s intent to relocate with the child. We affirm.

The relevant facts follow. Mother and Father were married in April 2000 and divorced on October 5, 2001. Pursuant to the divorce decree, Mother was awarded custody of the parties’ child J.R., born on August 2, 1999, and Father was awarded visitation in accordance with the Indiana Parenting Time Guidelines. Mother then lived in Bartholomew County, while Father lived in Jennings County.

On February 11, 2008, without informing Father, Mother reported for work at a new job in Massachusetts, and, that same day, her attorney filed her verified notice of intention to relocate there. In response, Father filed a verified motion for order restraining removal of child from the jurisdiction, an emergency petition for temporary custody of J.R., and a petition to modify custody. After a hearing on March 13, 2008, the trial court granted the restraining order as well as temporary custody of J.R. to Father.

On May 2, 2008, the trial court held an evidentiary hearing on Father’s motion to modify custody. After the hearing, the trial court granted Father’s motion, finding that Mother had proved that the relocation was made in good faith and for a legitimate reason, but that it was in the best interests of J.R. that custody be changed to Father. In particular, the trial court found that the distance of Mother’s relocation was significant, and that:

[Mother's] family is not close knit. [Father's] entire family and his new wife's family are all located within 50 miles and they are relatively close. [J.R.] has no relatives close in age in Massachusetts but does in Indiana.

* * * * *

[Mother] decided to move 950 miles away for a better job. This was done without thinking what effect this may have on her child and the child's father. Most of [J.R.'s] relatives that she sees on a regular basis live in Indiana. This is the main factor in this Court['s] decision.

Appellant's Appendix at 7.

The issue is whether the trial court abused its discretion by granting Father's motion based on Mother's intent to relocate with the child. The modification of a custody order lies within the sound discretion of the trial court. Spencer v. Spencer, 684 N.E.2d 500, 501 (Ind. Ct. App. 1997), reh'g denied. "We review custody modifications for abuse of discretion, with a 'preference for granting latitude and deference to our trial judges in family law matters.'" Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (quoting In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993)). Judgments in custody matters usually turn on essentially factual determinations and will be set aside only when they are "clearly erroneous." Baxendale v. Raich, 878 N.E.2d 1252, 1257 (Ind. 2008). We will not reverse the trial court's judgment if any evidence or legitimate inferences support the trial court's judgment. Id. at 1257-58. "The concern for finality in custody matters reinforces this doctrine." Id. at 1258. Upon appeal, it is not enough that the evidence might have supported some other conclusion; instead, before there is a basis for reversal, the evidence must positively require the other conclusion. Bettencourt v. Ford, 822 N.E.2d 989, 997 (Ind. Ct. App. 2005).

In general, an initial child custody order is determined “in accordance with the best interests of the child.” Baxendale, 878 N.E.2d at 1254 (quoting Ind. Code § 31-17-2-8). The court is to “consider all relevant factors” in determining the child’s best interests, including a nonexclusive list of factors. Id. at 1254-1255 (quoting Ind. Code § 31-17-2-8).

The general provision governing custody modification is found in Ind. Code § 31-17-2-21. Id. Modifications are permitted only if the modification is in the best interests of the child and there has been “a substantial change” in one or more of the factors identified in Ind. Code § 31-17-2-8 as considerations in the initial custody determination. Id. (quoting Ind. Code § 31-17-2-21(a)). These include the interrelationship of the child with parents, siblings, and others “who may significantly affect the child’s best interests.” Id. (quoting Ind. Code § 31-17-2-8).

On July 1, 2006, an entire new chapter 2.2 governing relocation in child custody cases was added to the “Custody and Visitation Rights” article of the Family Law title in the Indiana Code. See Ind. Code §§ 31-17-2.2. This new chapter was recently summarized by the Indiana Supreme Court in Baxendale:

“Relocation” is “a change in the primary residence of an individual for a period of at least sixty (60) days,” and no longer requires a move of 100 miles or out of state. [Ind. Code] § 31-9-2-107.7. A “relocating individual” is someone who “has or is seeking: (1) custody of a child; or (2) parenting time with a child; and intends to move the individual’s principal residence.” Id. § 31-9-2-107.5. A “nonrelocating parent” is someone “who has, or is seeking: (1) custody of the child; or (2) parenting time with the child; and does not intend to move the individual’s principal residence.” Id. § 31-9-2-84.7. Upon motion of either parent, the court must hold a hearing to review and modify custody “if appropriate.” Id. § 31-17-2.2-1(b). In determining whether to modify a custody order, the court is directed to

consider several additional factors that are set out in section 31-17-2.2-1(b) and are specific to relocation.^[1] In general, the court must consider the financial impact of relocation on the affected parties and the motivation for the relocation in addition to the effects on the child, parents, and others identified in Section 8 as relevant to every change of custody.

878 N.E.2d at 1255-56 (footnotes omitted).

Under Chapter 2.2, there are two ways to object to a proposed relocation: a motion to modify a custody order under Ind. Code § 31-17-2.2-1(b), and a motion to prevent the relocation of a child under Ind. Code § 31-17-2.2-5(a). See Baxendale, 878 N.E.2d at 1256 n.5. If the non-relocating parent does not file a motion to prevent relocation, then the relocating parent with custody of the child may relocate. Id. If the non-relocating parent does file a motion to prevent relocation, then the relocating parent must first prove that “the proposed relocation is made in good faith and for a legitimate reason.” Id. (quoting Ind. Code § 31-17-2.2-5(c)). If this burden is met, then the non-relocating parent must prove that “the proposed relocation is not in the best interests of the child.” Id. (quoting Ind. Code § 31-17-2.2-5(d)). Under either a motion to prevent relocation or a motion to modify custody, if the relocation is made in good faith “both analyses ultimately turn on the ‘best interests of the child.’” Id.

¹ These factors are: (1) the distance involved in the proposed change of residence; (2) the hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation; (3) the feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties; (4) whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual’s contact with the child; (5) the relocating parent’s reasons for relocating the child and the nonrelocating parent’s reasons for opposing the relocation of the child; and (6) other factors affecting the best interest of the child. Ind. Code § 31-17-2.2-1(b). Mother does not dispute that the trial court adequately considered these factors.

The current statutory framework does not necessarily require that a substantial change in one of the original Ind. Code § 31-17-2-8 factors be found before a change in custody may be ordered after a relocation. Id. at 1257. Under Chapter 2.2, a relocation may or may not have significant effects on the child's best interest and, therefore, may or may not warrant a change of custody. Id. Indeed, "the fact of relocation alone does not of itself require a change in custody. However, the circumstances surrounding a relocation can create substantial changes for the child, including changes in the factors described in [Ind. Code § 31-17-2-8] and also those provided by [Chapter 2.2]." Id. at 1258.

Here, although it appears that J.R. is close to Mother, J.R. is also close to Father and Father's wife, even though Father was not the custodial parent. Father has extensive family living in the vicinity, including Father's parents, a brother and sister who each have their own children, and his wife's children, with all of whom J.R. interacts well and has a strong relationship. J.R.'s step-grandfather also actively cares for J.R., feeds her, and takes her to school. In contrast, J.R. would have only Mother, Mother's husband, and two older step siblings as family in Massachusetts.

We also note that, while living with Mother, J.R. struggled in school, but, after temporary custody was awarded to Father, Father enrolled J.R. in the Sylvan Learning Center, and J.R.'s grades have improved. Father helps J.R. with her homework, and J.R. is also involved in several activities with Father's stepchildren, such as swimming and reading.

From this evidence, the trial court concluded that it would be in the best interests of J.R. to remain with Father and her family and friends in Indiana, and not relocate to Massachusetts with Mother. The trial court's findings indicate that relocation would result in a substantial change in J.R.'s interaction with Father and her family. The trial court was faced with two options, both of which would potentially disrupt J.R.'s life. By deciding to have J.R. remain with Father and his extended family, the trial court chose what appeared to be the least disruptive option based on the evidence before it. We cannot say that the trial court erred in reaching the conclusion that it did.

Mother emphasizes certain remarks made by the trial court at the hearing in March 2008 on Father's motion for order restraining removal of child from the jurisdiction and his emergency petition for temporary custody. These remarks, taken out of context, appear to suggest that Mother's move to Massachusetts would not impose a substantial change on the parties. After the May 2008 hearing, the trial court found otherwise, and Mother does not dispute the evidence the trial court relied on in making its determination. Looking at the evidence favorable to the trial court's decision, we conclude that the trial court's decision was well within its discretion. We therefore affirm the judgment of the trial court. See, e.g., id. at 1258 (holding that modification was permissible because mother's relocation would result in a substantial change in child's relationship with his father, grandmother, and brother, and in his adjustment to school and other activities)

For the foregoing reasons, we affirm the trial court's grant of Father's motion to modify custody.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur